

**NICHOLSON TERMINAL & DOCK COMPANY,**

**Respondent**

**and**

**Case 07-CA-187907**

**STEVE LAVENDER, AN INDIVIDUAL,**

**Charging Party**

**COUNSEL FOR THE GENERAL COUNSEL’S OPPOSITION TO RE-OPENING THE  
RECORD TO SUBMIT ADDITIONAL EVIDENCE AND MOTION TO AMEND  
CERTAIN RULES FROM PARAGRAPH 6 OF THE COMPLAINT**

Pursuant to the December 15, 2017 Order of Administrative Law Judge Elizabeth M. Tafe, who heard this case on July 27, 2017, Counsel for the General Counsel submits this Opposition to Re-opening the Record to Submit Additional Evidence. Further, pursuant to Section 102.17 of the Board’s Rules and Regulations, Counsel for the General Counsel also submits this Motion to Amend Certain Rules from Paragraph 6 of the Complaint.

**I. OPPOSITION TO RE-OPENING THE RECORD TO SUBMIT  
ADDITIONAL EVIDENCE**

There is no need to re-open the record in this case following the Board’s December 14, 2017 decision in *Boeing Company*, 365 NLRB No. 154 (2017). In *Boeing*, the Board overruled relevant parts of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) and announced new standards by which facially neutral rules should be analyzed in order to determine whether such rules violate the Act. The Board made these new standards retroactive and thus applicable to the instant case.

Yet, the record already contains the relevant evidence to address the Board’s new standard because the instant case was litigated by both Respondent and the General Counsel with then-member Miscimarra’s dissent in *William Beaumont Hospital*, 363 NLRB No. 162, slip op.

at 7-24 (2016) in mind. In particular, Respondent urged at hearing and in its brief that, pursuant to that dissent, the *Lutheran Heritage Village* “reasonably construe” prong applied to facially neutral rules should be overruled and a balancing test adopted that weighs the employer’s justification against the adverse impact on Section 7 activity. This test was, in fact, adopted by the Board in *Boeing*, 365 NLRB No. 154, slip op. at 3:

Under the standard we adopt today, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.

Thus, at hearing, as the record discloses, Respondent presented its business justifications for each rule named in the Complaint. Further, at hearing, Counsel for the General counsel cross-examined Respondent’s Treasurer Patrick Sutka as to the asserted business justifications for the rules. Therefore, reopening the record in this case is not warranted.

## **II. MOTION TO AMEND CERTAIN RULES FROM PARAGRAPH 6 OF THE COMPLAINT**

Pursuant to Section 102.17 of the Board’s Rules and Regulations, as an act of prosecutorial discretion, the General Counsel moves, by amendment to the Complaint, to withdraw<sup>1</sup> from Complaint Paragraph 6 the following rules:

**Rule II.A(26):** Failing to maintain confidential Company or vendor information;

**Rule III.L:** Trade Secrets and Confidential Information<sup>2</sup>

You, as an employee are in a position of trust and confidence with the Company, particularly since you will have access to trade secrets and other proprietary confidential information, knowledge and/or confidential matters with

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<sup>1</sup> At hearing, the Judge granted the General Counsel’s Motion to withdraw Rule II.A (17) by amendment to the Complaint. (Tr. 8-9.)

<sup>2</sup> As noted at hearing, Respondent’s 2016 Personnel Handbook contains two rules designated as “L.” (Tr. 55.) The Complaint only challenged the rule titled “Trade Secrets and Confidential Information” as overly broad. The rule titled “Conflict of Interest” was not at issue here.

respect to business, sales, costs, records...profits, products, sources of supply, customers, property...and other corporate activities of the company. It is required that you use your best efforts to protect against the disclosure of trade secrets and other proprietary confidential information.

Such information...or compilation of data which is used in the Company's business...may constitute secret or confidential information. Except as required in your duties to the company's business, you should not disclose or use at any time, either during or subsequent to your employment any secret or confidential information of the Company unless you first secure the written consent of the President of the Company.

**Rule III.N: Dress Code**

All employees are expected to dress appropriately for work. Your supervisor will assist you in determining what attire is appropriate. Some jobs may have additional restrictions for safety reasons.

**III. CONCLUSION**

For the foregoing reasons, Counsel for the General Counsel respectfully opposes the re-opening of the record in this case for the presentation of additional evidence and asks that the Judge grant the General Counsel's Motion to Amend Certain Rules from Paragraph 6 of the Complaint. With regard to the remaining Complaint allegations, Counsel for the General Counsel respectfully requests that the Judge find that Respondent violated Section 8(a)(1) of the Act as alleged in the Complaint and Notice of Hearing and as amended at hearing, and issue a recommended order to remedy Respondent's unfair labor practices.

DATED at Detroit, Michigan, this 29th day of December, 2017.

Respectfully Submitted,

/s/ Renée D. McKinney

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**CERTIFICATE OF SERVICE**

I certify that I have caused a true and correct copy of the foregoing **COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RE-OPENING THE RECORD TO SUBMIT ADDITIONAL EVIDENCE AND MOTION TO AMEND CERTAIN RULES FROM PARAGRAPH 6 OF THE COMPLAINT** to be served upon the following via the NLRB's e-filing system on December 29, 2017:

Elizabeth Tafe, Administrative Law Judge  
Division of Judges  
National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570-0001

I further certify that I have caused a true and correct copy of the above-referenced documents to be served on the following by e-mail or U.S. Mail on December 29, 2017:

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DATED at Detroit, Michigan, this 29th day of December, 2017.

Respectfully Submitted,

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